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Zamri bin Ibrahim v Hong Leong Bank Bhd

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HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22NCVC–04–06 OF 2017
CHAN JIT LI JC
8 APRIL 2019

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Civil Procedure — Striking out — Application to strike out claim — Plaintiff sued defendant premised on negligence — Defendant applied to strike out plaintiff's claim — Whether claim for negligence time-barred under s 6(1) of the Limitation Act 1953 — Whether defendant entitled to strike out plaintiff's claim — Rules of Court 2012 O 18 r 19

D

Limitation — Striking out action on ground of time bar — Strike out plaintiff's claim — Plaintiff sued defendant premised on negligence — Whether claim for negligence time-barred — Limitation Act 1953 s 6(1)

E

Enclosure 108 was the defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(a), (1)(b), (1)(c) and/or (1)(d) of the Rules of Court 2012 ('the ROC'). The defendant was a financial institution and it was vested with the interests, rights and liabilities of EON Finance. The plaintiff together with one Mohd Hanif bin Abdul Rahman ('Mohd Hanif') had taken a loan from EON Finance to finance the purchase of a piece of property ('the property'). As security for the loan, the plaintiff and Mohd Hanif assigned their benefits, rights and interests in the property to the defendant. The defendant released the loan sum to the developer, IJM Corp Bhd ('IJM') on 17 September 1997. By way of a letter dated 12 July 2003, IJM informed the defendant that the strata title to the property had been issued. However, IJM was unwilling to effect a transfer until the plaintiff and Mohd Hanif paid up the arrears of some outstanding charges. The defendant requested the plaintiff and Mohd Hanif to make the necessary payments so that a transfer of the title could be effected. The plaintiff and Mohd Hanif apparently did not make the payments. On 11 July 2013, the defendant issued a notice of demand to both the plaintiff and Mohd Hanif for failure to pay the outstanding loan debt. When both of them failed to make payment, the defendant issued a letter of termination and recall on 25 July 2013. On 20 September 2013, the defendant issued the notice of termination of license and notice to quit before exercising its rights as the assignee to sell the property by way of public auction. On 17 July 2014, the property was auctioned off at the price of RM206,900. The plaintiff instituted this action claiming that he suffered loss as a result of the defendant's negligence. The purported negligence were: (a) the defendant's failure to

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A procure and transfer the strata title from IJM to the plaintiff; and (b) the defendant's negligence in releasing the loan funds to IJM without first ascertaining that IJM had delivered vacant possession. The defendant submitted that the plaintiff's claim was unsustainable as the action was filed after the limitation period. The plaintiff submitted that s 6(1)(a) of the B Limitation Act 1953 ('the LA') could not apply in this case as a trust was created when the plaintiff executed a power of attorney in favour of the defendant and hence s 22 of the LA should apply.

C **Held,** allowing encl 108 with costs of RM8,000:

(1) The court found that the plaintiff's submission was without merit. The plaintiff's cause of action was premised on negligence and the subject matter was not trust property. Therefore, the plaintiff could not avail himself of s 22 of the LA. In the final analysis, the court found that the D present action was instituted after the limitation period had set in and hence could not be sustained (see para 21).

[Bahasa Malaysia summary

Lampiran 108 adalah permohonan defendan untuk membatalkan tuntutan E plaintif di bawah A 18 k 19(1)(a), (1)(b), (1)(c) dan/atau (1)(d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Defendan adalah sebuah institusi kewangan dan telah diletakkan hak kepada kepentingan, hak dan liabiliti EON Finance. Plaintif bersama-sama dengan seorang Mohd Hanif bin Abdul Rahman ('Mohd Hanif') telah mengambil pinjaman daripada EON Finance F untuk membiayai pembelian sebidang harta ('harta'). Sebagai jaminan untuk pinjaman itu, plaintif dan Mohd Hanif memberikan faedah, hak dan kepentingan mereka ke dalam harta itu kepada defendan. Defendan mengeluarkan jumlah pinjaman kepada pemaju, IJM Corp Bhd ('IJM') pada 17 September 1997. Melalui surat bertarikh 12 Julai 2003, IJM memberitahu G defendan bahawa hakmilik strata kepada harta itu telah dikeluarkan. Walau bagaimanapun, IJM tidak mahu melaksanakan pemindahan sehingga plaintif dan Mohd Hanif membayar tunggakan beberapa caj yang belum dijelaskan. Defendan meminta plaintif dan Mohd Hanif membuat pembayaran yang diperlukan supaya perpindahan hakmilik itu dapat dilaksanakan. Plaintif dan H Mohd Hanif tidak membuat pembayaran. Pada 11 Julai 2013, defendan mengeluarkan notis tuntutan kepada plaintif dan Mohd Hanif kerana kegagalan membayar hutang pinjaman. Apabila kedua-dua mereka gagal membuat pembayaran, defendan mengeluarkan surat penamatan dan tarik balik pada 25 Julai 2013. Pada 20 September 2013, defendan mengeluarkan I notis penamatan lesen dan notis tamat sebelum melaksanakan haknya sebagai pemegang serah hak untuk menjual harta itu melalui lelongan awam. Pada 17 Julai 2014, harta itu dilelong dengan harga RM206,900. Plaintif memulakan tindakan ini mendakwa bahawa dia mengalami kerugian akibat kecuaian defendan. Kecuaian yang dikatakan adalah: (a) kegagalan defendan

untuk mendapatkan dan memindahkan hakmilik strata dari IJM kepada plaintif; dan (b) kecuaian defendan dalam melepaskan dana pinjaman kepada IJM tanpa terlebih dahulu memastikan bahawa IJM telah menyerahkan pemilikan kosong. Defendan berhujah bahawa tuntutan plaintif tidak dapat dikekalkan kerana tindakan itu difailkan selepas tempoh had masa. Plaintif berhujah bahawa s 6(1)(a) Akta Had Masa 1953 ('AHM') tidak boleh digunakan dalam kes ini kerana satu amanah dicipta apabila plaintif menyempurnakan surat kuasa wakil yang memihak kepada defendan dan oleh itu s 22 AHM terpakai.

Diputuskan, membenarkan lampiran 108 dengan kos sebanyak RM8,000:

(1) Mahkamah mendapati bahawa hujahan plaintif adalah tanpa merit. Kausa tindakan plaintif adalah berdasarkan kecuaian dan perkara subjek tersebut bukan harta amanah. Oleh itu, plaintif tidak dapat menggunakan s 22 AHM. Dalam analisis terakhir, mahkamah mendapati bahawa tindakan ini dimulakan selepas tempoh had masa tamat dan oleh itu tidak dapat dikekalkan (lihat perenggan 21).]

Notes

For a case on strike out plaintiff's claim, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) para 2734.

For cases on striking out in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9230–9582.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a), 22
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)

Mohd Hanif bin Abd Rahman (Zamri Ibrahim & Co) for the plaintiff.
Jack Yow (Rahmat Lim & Partners) for the defendant.

Chan Jit Li JC:

[1] Enclosure 108 is the defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ('the ROC').

[2] The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 sets out the law on striking off as follows:

The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19 (1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[3] In the instant case, the plaintiff's cause of action against the defendant is premised on negligence.

[4] The defendant is a financial institution and it is not disputed that it is vested with the interests, rights and liabilities of EON Finance.

[5] The plaintiff is an individual practicing as a legal practitioner at the time the cause of action arose. The plaintiff together with one Mohd Hanif bin Abdul Rahman had taken a loan from EON Finance to finance the purchase of a piece of property identified as Unit 8-5, Wisma Pantai, Kampong Gajah, 12200 Butterworth ('the property').

[6] As security for the loan, the plaintiff and Mohd Hanif assigned their benefits, rights and interests in the property to the defendant.

[7] The defendant released the loan sum to the developer, IJM Corp Bhd ('IJM') on 17 September 1997.

[8] By way of a letter dated 12 July 2003, IJM informed the defendant that the strata title to the property had been issued. However, IJM was unwilling to effect a transfer until the plaintiff and Mohd Hanif paid up the arrears of some outstanding charges. Upon receipt of IJM's letter, the defendant requested the plaintiff and Mohd Hanif to make the necessary payments so that a transfer of the title could be effected. The plaintiff and Mohd Hanif apparently did not make the payments.

[9] IJM instituted an action at the Sessions Court at Butterworth to recover the said arrears. The Butterworth Sessions Court action was transferred to the High Court at Penang. At the completion of the hearing, the High Court

dismissed IJM's claim. IJM appealed against the said order of dismissal. On appeal, the Court of Appeal allowed the appeal. IJM sought to enforce its judgment by instituting bankruptcy proceedings against the plaintiff and Mohd Hanif resulting in Mohd Hanif being declared a bankrupt.

[10] On 11 July 2013, the defendant issued a notice of demand to both the plaintiff and Mohd Hanif for failure to pay the outstanding loan debt. When both of them failed to make payment, the defendant issued a letter of termination and recall on 25 July 2013. On 20 September 2013, the defendant issued the notice of termination of license and notice to quit before exercising its rights as the assignee to sell the property by way of public auction. On 17 July 2014, the property was auctioned off at the price of RM206,900.

[11] The plaintiff instituted the present action claiming that he suffered loss as a result of the defendant's negligence. The plaintiff contended that as the assignee, the duty was on the defendant to procure the transfer of the title from IJM. The defendant had failed to discharge this duty. The plaintiff further allege that the defendant was negligent in releasing the loan sum to IJM without first ascertaining that IJM had delivered vacant possession.

[12] Hence, the plaintiff seeks the following reliefs:

> 52. Plaintif dengan ini menuntut hak-haknya seperti berikut sebagaimana yang diperuntukkan di bawah Akta Relif Spesifik 1950, Akta Kontrak 1950, Akta Perlindungan Pengguna 1999 dan Akta Fitnah 1957:
>
> (i) Deklarasi bahawa Loan Agreement Cum Assignment bertarikh 02.08.1997 terbatal dari tarikh surat Plaintif pada 27.09.2013.
>
> (ii) Defendan mengembalikan kesemua bayaran yang telah dibuat oleh Plaintif ke dalam Revolving Credit Account No. 38481001541 sebanyak RM208,019.75 yang dikira dari 22.07.2004 sehingga 12.07.2011 dan Fixed Loan Account No. 38481001321 sebanyak RM118,620.28.
>
> (iii) Defendan mengira dan mengembalikan kesemua bayaran yang telah dibuat oleh Plaintif ke dalam Revolving Credit Account No 38481001541 dari bulan Oktober 1997 sehingga bulan Jun 2004.
>
> (iv) Defendan menghapuskira baki pinjaman dalam Fixed Loan Account No 38481001321 sebanyak RM99,153.00 yang termasuk kos dan faedah setakat 30.04.2014 dan menutup akaun pinjaman tersebut.
>
> (v) Defendan membayar gantirugi sebanyak RM618,245.13 dan faedah sebagaimana yang diperintahkan oleh Mahkamah Rayuan ke atas Plaintif untuk dibayar kepada IJM.

(vi) Defendan membayar kos yang diperintahkan ke atas Plaintif oleh Mahkamah Persekutuan pada 11.02.2014 sebanyak RM10,000.00 dan Mahkamah Rayuan pada 22.05.2014 sebanyak RM10,000.00 untuk dibayar kepada IJM.

(vii) Defendan membayar gantirugi sebanyak RM438,000.00 atas kegagalan Plaintif untuk menikmati kegunaan Hartanah tersebut atau menyewa atau menjualnya yang dikira sebanyak RM2,000.00 sebulan dari tarikh pembayaran baki Harga Jualan tersebut pada 17.09.1997 sehingga 30.05.2015.

(viii) Defendan mengembalikan segala kos dan faedah yang dikenakan ke atas Plaintif berkaitan lelongan Hartanah tersebut.

(ix) Defendan memohon maaf secara bertulis dalam format yang dipersetujui Plaintif dan diiklankan dalam akhbar utama selama 3 hari.

(x) Defendan memperbetul dan membatalkan nama Plaintif dari daftar Credit Tip-Off Service ("CTOS") dan Central Credit Reference Information System ("CCRIS") atau mana-mana daftar rujukan kredit.

(xi) Defendan membayar gantirugi am bagi kesusahan dan kerosakan pada nama baik dan reputasi Plaintif.

(xii) Defendan membayar gantirugi teladan.

(xiii) Kos dan faedah.

(xiv) Lain-lain relif yang diperintahkan oleh Mahkamah Yang Mulia ini.

[13] The defendant raised several issues in support of its application to strike out the plaintiff's claim. After considering the submissions of both parties, I am of the view that the first issue to be determined is that of limitation.

[14] The plaintiff has set out the defendant's alleged acts of negligence in para 51 of the statement of claim. Paragraph 51 reads as follows:

51. Butir-butir keingkaran pihak Defendan, ejen atau perkhidmatannya adalah:

(i) Dengan cuainya membuat bayaran penuh kepada IJM sebanyak RM292,000.00 pengesahan bahawa Milikan Kosong telah diserahkan kepada Plaintiff.

(ii) Cuai, gagal dan/atau enggan untuk mengambil apa-apa tindakan bagi mendapatkan Hakmilik Strata Hartanah tersebut yang telah dikeluarkan pada 01.04.2002 bersama-sama dengan Memorandum Pindahmilik yang ditandangani oleh IJM supaya boleh dipindahmilik ke nama Plaintif.

(iii) Cuai, gagal dan/atau enggan melaksanakan subrogasi terhadap IJM bagi melindungi hak dan kepentingan Plaintif yang telah diserahkan sepenuhnya kepada Defendan melalui Klausa 7 LACA tersebut setelah IJM gagal mematuhi akujanjinya untuk menyerah Hakmilik Strata

Hartanah tersebut bersama dengan Memorandum Pindahmilik yang telah ditandatangani sehingga sekarang.

[15] For ease of reference, I shall classify the purported negligence as: (i) the defendant's failure to procure and transfer the strata title from IJM to the plaintiff; and (ii) the defendant's negligence in releasing the loan funds to IJM without first ascertaining that IJM had delivered vacant possession.

[16] Encik Jack Yow ('En Jack'), learned counsel for the defendant submits that the plaintiff's claim is obviously unsustainable as the action was filed after the limitation period. In respect of (i) the failure to procure and transfer the strata title from IJM to the plaintiff, the cause of action arose when IJM informed the defendant that the strata title was ready and thereafter the defendant informed the plaintiff of the same. This took place in July 2003.

In respect of (ii) releasing the loan funds to IJM without first ascertaining that IJM had delivered vacant possession, the monies were released in September 1997.

[17] En Jack submits that by instituting this suit in 2015, the plaintiff was by virtue of s 6(1)(a) of the Limitation Act 1953 (Revised 1981) was obviously out of time.

[18] Section 6(1)(a) of the Limitation Act 1953 provides as follows:

> 6 Limitation of actions of contract and tort and certain other actions.
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;
>
> (b) ...

It is, therefore, the defendant's contention that the plaintiff was required to institute the action in respect of: (i) the failure to procure and transfer the strata title from IJM to the plaintiff at the latest by 2009 and in respect of; (ii) releasing the loan funds to IJM without first ascertaining that IJM had delivered vacant possession at the latest by 2003.

[19] In the plaintiff's written submission, learned counsel for the plaintiff submitted that s 6(1)(a) of the Limitation Act 1953 cannot apply in this case. This was because a trust was created when the plaintiff executed a power of attorney in favour of the defendant as required by cl 20(i) of the agreement. As such, s 22 of the Limitation Act 1953 should apply.

[20] Section 22 reads as follows:

> 22 Limitation of actions in respect of trust property
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[21] With the greatest of respect to learned counsel, I find that his submission is without merit. The plaintiff's cause of action is premised on negligence and the subject matter is not trust property. Therefore, the plaintiff cannot avail himself of s 22 of the Limitation Act 1953.

In the final analysis, I find that the present action was instituted after the limitation period had set in and hence cannot be sustained.

[22] I have also taken into consideration the other issues raised by the learned counsel for the parties. I do not propose to dwell further on them save that my view of them would not have any effect on my final determination of this application.

[23] Accordingly, encl 108 is allowed with costs of RM8,000.

Enclosure 108 allowed with costs of RM8,000.

Reported by Nabilah Syahida Abdullah Salleh